No. 11599

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SAMUEL MORRIS WIXMAN, also known as SHULIM WIXMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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Samuel Morris Wixman, appellant, respectfully requests rehearing in this cause. The ground for this petition is:

This Court gave no consideration to appellant's major argument for reversal of the District Court's judgment; namely, that the District Court's denial of appellant's petition for naturalization was based on an erroneous interpretation of the "principles of the Constitution" to which the naturalization statute requires attachment. Appellant believes that the question of the correctness of the District Court's interpretation was fully and adequately presented before this Court; that he has made a strong showing, meriting this Court's serious attention, as to the District Court's error; and that the judgment herein upholds a statutory interpretation, without this Court's consideration thereof, which is seriously detrimental to the proper and lawful administration of the naturalization law and which results in a grave miscarriage of justice to appellant.

ARGUMENT.

I.

The Question of the District Court's Error in Its Interpretation of the "Principles of the Constitution" Was Fully and Adequately Raised Before This Court.

(a) Repeated Emphasis on Question of Statutory Interpretation.

From the very inception, the question of the meaning of the "principles of the Constitution," as the phrase is used in the naturalization statute, has been of basic importance in this case. This question was argued both by counsel for appellant [Tr. pp. 320, 328-355, 372-376] and appellee [Tr. pp. 363-4] in the District Court; and its crucial nature was clearly recognized by the District Judge. He obviously deemed the evidence as to the nature of appellant's belief, and the meaning of "the principles of the Constitution" as two complementary parts of the issue of whether appellant was attached to such principles; and in order to compare the former with the latter, explicitly and implicitly throughout his opinion defines those principles [Tr. pp. 387, 388, 390, 392, 396, 401, 403].[1] Then, appellant's "Specification of Errors" in his Brief in this Court specified as error the District Court's conclusion "that the belief is 'collectivism' of industry which it found appellant to possess is inconsistent with the principles of the Constitution, and in its holding on the basis of such

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[1]Appellant wishes to express his respectful disagreement with this Court's observation (at footnote 4 of the opinion) that the District Court was not required, by Rule 52 of the Federal Rules of Civil Procedure, to "find the facts specially." For citizenship proceedings would seem to fall within the exception specified in Rule 81 (a) 2, since the naturalization statute does not specify any procedure with respect to rendering an opinion and the practice in citizenship cases prior to the Rules, "conformed to the practice in actions at law or suits in equity."

conclusion that appellant had not sustained the burden of proving attachment to such principles" (App. Br. p. 14); and in the opening of his Statement of Points to Be Argued, appellant emphasizes and underscores the major importance of the District Judge's error as to the meaning of "the principles of the Constitution" (App. Br. p. 15). Appellant's Brief next sets forth as Point II of its two points that "the Court erred in its interpretation of the principles of the Constitution of the United States, and it consequently erred in holding that appellant was not attached to such principles and was not well disposed to the good order and happiness of the United States, within the meaning of the naturalization law" (App. Br. pp. 16, 25). And the argument on this point is devoted to showing that the beliefs which the District Court found appellant to possess are consistent with constitutional principles under the Supreme Court's interpretation thereof, and that the District Court's conclusion as to the content of such principles was erroneous. In reply, appellee's Summary of Argument states as Point II of its two points that "The trial court was correct in its interpretation of the principles of the Constitution, and in concluding that appellant's views were contrary to such principles within the meaning of the naturalization laws" (App. Br. p. 3): and in its argument under this point (Br. pp. 15-25) appellee attempts to show the inapplicability of the Supreme Court decisions cited by appellant as to the meaning of the principles of the Constitution and to show the inconsistency of such principles with appellant's beliefs. Appellant again emphasized the District Court's error with respect to its interpretation of the principles of the Constitution in its reply brief, and the point was fully argued, both by appellant and appellee, without any objection from this Court or the appellee, at the oral argument.

(b) This Court's Failure to Consider the Question of Statutory Interpretation.

Despite the importance of this point of interpretation and the emphasis placed on it throughout by the District Court and both parties, this Court does not even advert to it in its opinion. And it is clear, in view of this Court's reasoning in upholding the District Court's judgment, that it only considered the other branch of this case: that is, the correctness of the District Court's determination as to the substance of appellant's beliefs. For this Court's reasoning, in upholding the District Court's judgment, with respect to the District Court's ability to pass on the credibility of witnesses and similar points, has no application to the District Court's interpretation of the "principles of the Constitution." It cannot be doubted that courts of appeal must pass *de novo* on such a question of law.

While this Court was not explicit as to its reasons for ignoring the question of statutory interpretation, there is some implication, by virtue of its emphasis on the Statement of Points on Appeal, that it did not deem this question to be covered thereby. We believe it is adequately covered by Point 3 reading, "The denial of the petition and the judgment thereon by the District Court is not supported by the evidence" [Tr. p. 32]. It is respectfully submitted that this point covers the argument that the principles of the Constitution are such that the evidence cannot be deemed to support the judgment of a lack of attachment to such principles, as well as the argument that the evidence itself is such that it cannot be deemed to support this judgment. For it is obviously impossible to determine whether or not evidence supports a judgment of a lack of attachment to the principles of the Constitution without determining what those principles are.

But even if the Points set forth in the Statement are not deemed to cover with sufficient clarity the point that the District Court erred in its interpretation of "principles of the Constitution," we respectfully submit that this omission in no way bars this Court's consideration of the argument. For it seems clear that the Rules of this Court are intended to give binding effect to the Statement of Points on Appeal, at the most, only in those cases where the appellant designates as the record on appeal merely parts of the record in the District Court. In the instant case the appellant designated the entire record before the District Court as the record on appeal [Tr. p. 28]; if in such a case the Statement of Points on Appeal should be filed at all, such Statement should not under the Rules of this Court, and cannot consistently with the Federal Rules of Civil Procedure as amended, preclude the appellant from raising an important point in his brief and argument. Particularly is this so where, as here, no prejudice whatsoever resulted to appellee from any deficiency in the Statement, and when there were, as will be shown below, ample reason excusing any inadequacy of the Statement of Points on Appeal.

(c) Federal Rules of Civil Procedure.

Rule 75 of the Federal Rules of Civil Procedure entitled, "Record on Appeal to a Circuit Court of Appeals," to which Rule 19 of the Rules of this Court must be deemed supplementary,[2] provides for designation of the record on appeal (Rule 75 (a)), filing of the transcript

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[2]Any law in conflict with the Federal Rules is of no force and effect. Act of June 19, 1934, c. 651, sec. 1, 48 Stat. 1064, 28 U. S. C. 723b.

(Rule 75 (b)), the form of testimony (Rule 75 (c)), and then provides:

> (d) Statement of Points. No assignment of errors is necessary. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal (as amended by amendments adopted by Supreme Court of the United States, Dec. 27, 1946).

We respectfully submit that it is inconsistent with Rule 75 (d) to require the appellant to file the Statement of Points on Appeal when he designates the entire record. And the Rule was thus interpreted even before the 1947 amendment adding thereto the first sentence, "No assignment of errors is necessary." For as a noted commentator stated:

> "There is no reason for assignments of error being prepared for presentation to the appellate court prior to making up the record except as a basis for what is to be included in it. If the whole record is to be sent up there is no use for any assignment; but if the appellant designates only a part of the record he should specify the points he relies upon, so that the appellee may determine whether he wants some additional matter put in to protect him on the designated points. The assignments of error or points *are therefore to be employed under the new rules only when they are of some use.*" (Sunderland, *The New Federal Rules,* 45 W. Va. Law Quarterly 5, 1938.) (Italics added.)

Since the 1947 amendment with respect to assignments of error, it seems even clearer that the Rule intends that

the Statement of Points should *not* be required when the entire record is designated. For the purpose of the Rules is to make procedure simple and expeditious, and to eliminate unnecessary routines and procedural pitfalls (see Rule 1).[3] If Rule 75 is treated as setting forth only the minimum conditions for filing the Statement and the Statement is made obligatory in every case despite the limitation in Rule 75 as to when it is required, it would seem that the purpose of Rule 75 is entirely frustrated. For the assignment of errors was to be eliminated and the Statement to be substituted therefor to the limited extent that some type of assignment served a useful purpose.[4] If, despite the Rule, a Circuit Court requires a Statement of Points even when the entire record is designated, the result will be to reinstate under another name the procedural entanglement which the Rule sought to eliminate. And if obligatory even when the whole record is designated, such Statement would be required without reason or any regard for its rationale; for it is obvious under Rule 75, and has never been doubted by courts or commentators,[5] that the purpose of the Statement is to afford protection to the adversary with respect to his designation of additional parts of the record.

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[3]And see *Mutual Benefit Health and Accident Ass'n. v. Snyder*, 109 F. (2d) 469, 470 (C. C. A. 6, 1940).

[4]See Ilsen & Hone, *Federal Appellate Practice as Affected by the Rules of Civil Procedure*, p. 457, printed in Federal Rules of Civil Procedure, 1947 Revised Edition (West Publishing Co.); and *Mutual Benefit Health and Accident Ass'n. v. Snyder*, cited *supra*, footnote 3, and Sunderland, *loc. cit. supra*, as to the relation between assignments of error and the Statement of Points on Appeal under the Rules.

[5]See Sunderland, *loc. cit. supra*; *Boston & Maine RR. v. Jesionowski*, 154 F. (2d) 703 (C. C. A. 1, 1946); *Ashton v. Town of Deerfield Beach*, 155 F. (2d) 40, 42 (C. C. A. 5, 1946); *Keeley v. Mutual Life Ins. Co. of New York*, 113 F. (2d) 633 (C. C. A. 7, 1940).

(d) Rules of This Court.

Rule 19 of this Court seems entirely consistent and harmonious in purpose and language with Rule 75. This Rule states:

> "(6) The appellant shall, upon the filing of the record in this court, in all cases * * * file with the clerk a concise statement of the points on which he intends to rely on the appeal, and designate the parts of the record which he thinks necessary for the consideration thereof. * * * If parts of the record shall be so designated by one or both of the parties or if such parts be distinctly designated by stipulation of counsel * * * the clerk shall print those parts only; and the court will consider nothing but those parts and the points so stated."

It seems that the provision that "the court will consider nothing but . . . the points so stated" is intended to be modified by the introductory clause, "If parts of the record shall be designated by one or both parties or if such parts be . . . designated by stipulation"—in the same way as that clause modifies the provision that "the clerk shall print those parts only" and "the court will consider nothing but those parts of the record." Indeed, if Rule 19 were construed to mean that the Statement of Points limited the Court's consideration in other cases as well, it would seem to be contrary to the Federal Rules. For to say not only that the Statement of Points is required in all cases but to give it such a drastic effect in all cases, deprives of all force the limitation in the Federal

Rules that the Statement of Points is to be filed "if the appellant does not designate the complete record" and is contrary to Rule 75's entire intendment, as above discussed (*supra,* p. 6). Further, it is clear under the Rule of this Court, as under the Federal Rule, that the purpose of the Statement is to protect the adversary with respect to designation of the record; neither principle, precedent, nor reason can suggest any other function for it. For this Court's Rule, with respect to specification of errors in appellant's brief, fully protects the adversary as to the content of the appellant's argument. As was pointed out in connection with the Federal Rules, "The proper place for an assignment of errors is in the brief in the appellate court."[6] There is no need for the appellee to be informed of the appellant's points prior to the brief except for the purpose of designation of record. Thus, to interpret Rule 19 to mean that the Court is limited to the Statement of Points in its consideration of cases where the entire record is designated would serve no useful purpose and make the Rule merely a procedural trap; such interpretation is contrary to the language as well as to the rationale of the Rule, and to the intent of the Federal Rules of Civil Procedure, in consistency with which the Rules of this Court must be interpreted.[7]

In *Western Nat. Ins. Co. v. LeClare,* 163 F. (2d) 337 (C. C. A. 9, 1947), this Court stated that it need not

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[6]Ilsen & Hone, cited *supra,* footnote 4 at note 375, p. 457.

[7]See footnote 2, *supra.*

consider a point which had not been mentioned in appellant's Statement of Points. However, this decision does not indicate that the provision for limitation of consideration applies when the whole record is designated on appeal, since the Court did not there advert to whether or not the whole record was designated. Furthermore, this Court treated the provision for limited consideration as doing no more, in any case, then establishing a guide for this Court's discretion; for it stated that it had nevertheless "considered them" (the points omitted from the Statement of Points) (163 F. (2d) at p. 340). Finally, a factor further weakening the *Western Nat. Ins. Co.* case as authority for the proposition that the Statement of Points of itself limits this Court's consideration in any type of case, even one where the record is only partially designated, is the fact that this Court there relies upon its decision in *Bank of America Nat. Trust and Savings Ass'n. v. Commissioner,* 126 F. (2d) 48 (C. C. A. 9, 1942). In the latter case, the Statement of Points is a very minor factor among several, which, taken together, were deemed by this Court to indicate that it should not consider a point raised in argument; this Court there emphasized actual elements of prejudice and laches, rather than the Statement of Points, as the basis for its refusal to consider the point (see 126 F. (2d) at p. 52). Thus, it would appear that the instant case is the most extreme application that Rule 19 (6) has had, and that the instant application is unprecedented in its severity.

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In any event, the provision for limited consideration could hardly be considered to impose an absolute limit on this Court's jurisdiction, but is to be deemed merely a guide to its discretion; this interpretation of the Rule is borne out by the *Western Nat. Ins. Co.* case, as discussed above. In the case at bar, as has been clearly shown, the appellee was in no way prejudiced by the appellant's statement, assuming though not conceding, that the statement did not cover the issue of statutory interpretation. Rather the appellee was at all times aware that this was one of the major issues of the case and conducted the case on that basis. If the provision for limited consideration had any applicability to this case, despite the designation of the entire record, it was certainly waived by all participants. See *Ashton v. Town of Deerfield Beach,* cited *supra,* footnote 5, where it was held that even when the entire record was not designated, a question which was not specified in the Statement could and should be considered by the appellate court since appellee did not claim the record was incomplete with respect to the question. Furthermore, assuming any deficiency in the Statement, it is perfectly understandable, in the light of Rule 75 (d), Federal Rules of Civil Procedure, why counsel for appellant considered, as did also counsel for appellee, that all points raised in the briefs and reflected in the record would be passed upon by the Court.

Accordingly, if the provision for limited consideration has any application where the entire record is designated,

we submit that it would be an abuse of discretion to invoke it here where there is no prejudice from any possible deficiency in the Statement and any such deficiency was, moreover, excusable. Compare *Keeley v. Mutual Life Ins. Co.,* cited *supra,* footnote 5; *Drybrough v. Ware,* 111 F. (2d) 548 (C. C. A. 6, 1940).[8]

It is submitted that there is nothing in the Rules of this Court which limits this Court's power and duty to consider the major issue of this case; *i. e.,* the proper interpretation of "the principles of the Constitution" within the meaning of the naturalization law, and that this Court should therefore carry out its responsibility to consider this issue.[9]

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[8]Even in the cases where the Statement is required under the Federal Rule, the failure to file is not jurisdictional and does not necessitate dismissal of the appeal. See *Ilsen & Hone,* cited *supra,* footnote 4, at note 375. In the instant case there is at the least grave doubt as to whether the Rules of this Court require the Statement; and this Court's refusal to consider appellant's major argument is comparable, in its prejudicial effect on the appellant, to dismissal of his appeal.

[9]It may also be noted that this Court seemed to ignore the fact that appellant's petition was filed under Sec. 310 of the Nationality Act of 1940, 8 U. S. C. 710, which sets up a special residence requirement for spouses of American citizens; and treats it as an obvious conclusion, though this position was never advanced by appellee, that appellant must fulfill the showing of five years attachment required by Sec. 307 of the Nationality Act of 1940, 8 U. S. C. 707.

II.

The Question of the District Court's Error in Interpreting the "Principles of the Constitution" Involves Serious and Important Issues and Consequences, and Thus Requires the Consideration of This Court.

Appellant has argued in his main and reply briefs that the District Court's interpretation of the "principles of the Constitution" is contrary to controlling decisions of the United States Supreme Court. To take this argument at its very least, it seems clear that there is a serious question as to the validity of the District Court's interpretation under the Supreme Court's rulings. Thus, the District Court's decision involves an important question of law which this Court has not considered.

In essence appellant's argument is that the District Judge erected his own social and economic beliefs into a principle of the Constitution, contrary to the Supreme Court's interpretations of those principles. If this is true, the affirmance of the District Court's judgment has serious detrimental consequences; it allows District Judges to substitute their personal beliefs for the law of the land and does a grave disservice to the country by permitting them to bar from citizenry aliens who would be entirely acceptable under the law but are not favored by the particular District Judge. And in view of the high importance of citizenship to any alien, and to appellant in particular, an affirmance of the District Court's judgment, if it is based, as contended, on a misconception of the principles of the Constitution, involves a gross mis-

carriage of justice by denying to appellant what is rightfully his. For all these reasons this Court should consider the correctness of the District Court's interpretation of principles of the Constitution.

Conclusion.

The petition for rehearing should be granted. If this Court continues to believe that the Statement of Points on Appeal constitutes in any way an interference with this Court's power and duty to consider the District Court's error as to the meaning of "the principles of the Constitution," we respectfully move that leave to amend such Statement be granted together with this petition.

Respectfully submitted,

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Certificate of Counsel.

I hereby certify that in my judgment this Petition for Rehearing is well founded and that it is not interposed for delay.

Fred Okrand.